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UNITED STATES OF AMERICA

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1945

No. 539

CYNTHIA MILLS CLEVELAND,
Petitioner and Defendant Below,

vs.

SECOND NATIONAL BANK AND TRUST CO. of Saginaw, Michigan, individually and as Trustee under the Ninth and Tenth Paragraphs of the will of Arthur D. Eddy, deceased,
Respondent and Plaintiff Below.

RESPONDENT'S BRIEF
In Opposition to Petition for Writ of Certiorari

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OPINIONS OF COURTS BELOW

The last opinion in this case was filed May 22, 1945, and is found reported in *Cleveland v. Second National Bank & Trust Co.*, 149 Fed. (2d) 466, and refers to the trustee's fees charged against the petitioner.

The preceding opinion is found in *Van Auken v. Second National Bank & Trust Co.* (C.C.A.), 117 Fed. (2d) 938.

JURISDICTION

The respondent knows of no special and important reasons why a review on writ of certiorari should be granted, as the instant case involves only the amount of the trustee's expenses to be charged against the petitioner, the law of the case having been decided in *Van Auken v. Second National Bank & Trust Co.* (C.C.A.), 117 Fed. (2d) 938, certiorari denied by this court, 313 U. S. 593 (61 Sup. Ct. 1118, 85 L. Ed. 1547).

COUNTER-STATEMENT OF THE CASE

(Figures in parentheses refer to pages of the printed record except as the context clearly indicates otherwise, as in certain references to the pages of briefs filed in the main case.)

This litigation has been heretofore before this court, the Circuit Court of Appeals, Sixth Circuit, and the Michigan Supreme Court.

> "Cross claimants Van Auken and Mrs. Cleveland took an appeal from the judgment disallowing their counterclaim to the United States Circuit Court of Appeals, 6th Circuit, and the judgment of the district court was affirmed. *Van Auken v. Second National Bank & Trust Co.* (C.C.A.), 117 Fed. (2d) 938. Certiorari was denied by the United States Supreme Court, 313 U. S. 593 (61 Sup. Ct. 1118, 85 L. Ed. 1547). Defendants and cross-plaintiffs in the main case also took an appeal to the United States Circuit Court of Appeals, 6th Circuit, and the judgment of the district court was also affirmed, 117 Fed. (2d) 1009. A rehearing was denied. Certiorari to the United States Supreme Court was also denied, 313

U. S. 594 (61 Sup. Ct. 1119, 85 L. Ed. 1547)." *Second Nat'l Bank v. Reid*, 304 Mich. 376 at 386.

The instant litigation is an appeal from the judgment of the District Court dated November 30, 1943 (R. 48), directing the trustee's reimbursement for its expenses in the above litigation in the federal courts.

In its final judgment in the main litigation above referred to, being the judgment rendered in the District Court on February 7, 1939, in Equity Case No. 540 (R. 256-8), the District Court reserved to itself the right to fix and approve expenses of the trustee "as between solicitor and client," and in this connection ordered:

> "8. * * * that the trustee file with this court a report of its disbursements in the above matter, together with statement of accounts of its auditors and counsel, and upon approval thereof by this court, and prior to the turning over of any assets, that the same be paid out of the dividends due on the shares of stock eventually to be turned over to Cynthia Mills Cleveland" * * *.

Pursuant to such judgment, the trustee filed with the District Court reports of its disbursements in the above matter, including statements of accounts of its auditors and counsel, and including the disbursements incurred in the Circuit Court of Appeals and on the application for writ of certiorari in the Supreme Court of the United States.

A hearing was had on the reports and the court in its judgment approving same (R. 48), made a finding of fact that the disbursements were reasonable in amount, that

the disbursements, including fees of auditors and counsel, in the District Court and in the Circuit Court of Appeals for the Sixth Circuit, and upon application for writ of certiorari in the Supreme Court of the United States, were all in the above matter and directly a part thereof. The court then entered the judgment here appealed from (R. 48) approving the trustee's disbursements in the main litigation above referred to, and directed the trustee to pay the same out of the dividends due on the shares of stock eventually to be turned over to petitioner and reimburse the trust therefrom, and concluded the matter by ordering that the expenses of the hearing on the disbursements be paid by the trustee out of the dividends due on the shares of stock eventually to be turned over to petitioner, in the same manner as directed in the final judgment in the main litigation (R. 256-8).

The judgment of the District Court was affirmed by the Circuit Court of Appeals (Sixth Circuit) and petition for rehearing denied. See: 149 Fed. (2d) 466.

ARGUMENT

The Findings are Substantiated by the Testimony

The finding that the disbursements were "all in the above matter," is based on the fact that the final judgment in the main case rendered February 7, 1939 (Equity Case No. 540, District Court), included both the "fraud" and "mismanagement" subdivisions (R. 256-8). Paragraphs 2, 3 and 4 of that judgment concern the "mismanagement" branch of the case (Case No. 8366 C.C.A. Sixth Cir.) (117 Fed. (2d) 1009), and 5, 6 and 7 the so-called "fraud"

branch of the case, which was affirmed by the Circuit Court of Appeals, Sixth Circuit in Case No. 8336 C.C.A. Sixth Cir. (117 Fed. (2d) 938).

The only case in the District Court in which these matters are involved is Equity Case No. 540. The final judgment in that case covered and included both the "fraud" and the "mismanagement" divisions (R. 256-8).

The court was justified in its finding that the expenses in the Circuit Court of Appeals and in the Supreme Court of the United States should be included.

> "* * * Certainly the claim for 'as between solicitor and client' costs was not directly in issue in the original proceedings by Sprague. It was neither before the Circuit Court of Appeals nor before this court. Its disposition, therefore, by the mandate of either court could be implied only if a claim for such costs was necessarily implied in the claim in the original suit, and its failure to ask for such costs an implied waiver. These implications are repelled by the basis on which such costs are granted. *They are not of a routine character like ordinary taxable costs; they are contingent upon the exigencies of equitable litigation, the final disposition of which in its entire process including appeal place such a claim in much better perspective than it would have at an earlier stage.* * * * *Sprague v. Ticonic National Bank*, 307 U. S. 161 at 168; 59 Sup. Ct. Rep. 777 at 781. (Italics ours.)

American Canning Co. v. Ladoga Canning Co., 44 Fed. (2d) 763 at 771 and 772:

"The statute authorizing plaintiff's recovery of reasonable attorneys' fees directs their inclusion as

> a part of the costs. We find nothing in this statute which limits this allowance to services rendered in the District Court. Its terms are broad enough to include plaintiff's reasonable attorneys' fees necessarily incurred in any court wherein the cause was pending. A similar construction has been placed on a similar statute. *Davis v. Parrington* (C.C.A.) 281 F. 10, 17; *Louisville & N. R. Co. v. Dickerson* (C.C.A.) 191 F. 705, 712."

See *Patterson v. Northern Trust Company,* 286 Ill. 564, 122 N.E. 55.

Testimony of all the witnesses is that the charges were reasonable in amount for the work done (R. 130, 138, 142, 149, 174, 178).

The conclusiveness of the Federal Court adjudication was determined in the Michigan courts between the parties in the case of *Second National Bank & Trust Company of Saginaw v. Reid,* 304 Mich. 376, the court saying, at 396:

> "(9) Mrs. Cleveland further claims that the large sums she would be charged with for costs and expenses are wholly illegal and improper; that under *Davidson v. Young,* 290 Mich. 266, the trustee had the burden of providing the correctness of his account. The court in its findings held that the trustee had met this burden. The first suit was removed to the Federal Court by Mrs. Cleveland and she is bound by the judgment. In *Sprague v. Ticonic National Bank,* 307 U. S. 161 (59 Sup. Ct. 777, 83 L. Ed. 1184), the United States Supreme Court approved of the 'reimbursement for the costs of litigation other than the conventional taxable costs.' The judgments of the Federal Court are final and the parties are bound thereby."

A case very similar to the instant one was decided by the Circuit Court of Appeals (6th Cir.), in *O'Hara v. Oakland County, et al.*, 136 Federal (2d) 152, in which case the appellant O'Hara filed a petition in the District Court, in which he set forth that during the progress of the litigation, which had continued for nine years, he had represented certain parties, that almost the entire responsibility for the conduct of the litigation fell upon him, that he arranged for the testimony of practically all the expert and other witnesses, conducted the examination of said witnesses and cross-examination of witnesses and:

> "In addition to conducting the trial, Mr. O'Hara filed elaborate briefs and undertook the main argument for defendants, both before the Master and the District Court. He (with his associates in his firm) did practically all the work for defendants in preparing the 448-page record on appeal and wrote the great bulk of the brief of more than one hundred printed pages filed with the Court of Appeals. He handled the oral argument for the defendants before the Circuit Court of Appeals, and wrote and filed briefs in connection with a petition for rehearing filed by the bondholders, and also in connection with the petition for certiorari and rehearing thereon before the United States Supreme Court. In addition he participated in the collateral case already mentioned of *Highland Park v. Clark* (300 Mich. 501). * * *
>
> "The Master recommended an allowance to petitioner for his services of a fee of $30,000 to be paid out of the fund."

The court confirmed the special Master's report and the decree allowing the fee of $30,000 to be paid out of the fund of $133,030.56, and cited the cases of *Sprague v.*

Ticonic Bank, 307 U. S. 161, 59 S. Ct. 777, 83 L. Ed. 1184; *Trustees v. Greenough,* 105 U. S. 527, 26 L. Ed. 1157; *Wallace v. Fiske,* 8 Cir., 80 F. 2d. 897, 903.

From a reading of the case, the facts are almost similar. The amount allowed is substantially the same, and in the instant case the amount preserved was around Three Million Dollars, instead of One Hundred Thirty-three Thousand Dollars.

PETITIONER'S POSITION REVIEWED

(a) The Law of the Case has been Determined

Van Auken v. Second National Bank & Trust Co., 117 Fed. (2d) 1009; Certiorari denied, 313 U. S. 594.

Petitioner claims the District Court was in error in applying Section 8 of the judgment rendered by him in Equity Case No. 540 on February 7, 1939 (R. 256-8), to the accounts and facts disclosed by the testimony in this proceeding. It is a little late for that, as the judgment was affirmed by the Circuit Court of Appeals, Sixth Circuit and Certiorari denied by this court. The question of paragraph eight's validity was raised in the briefs, as we point out below (Sec. 2 hereof).

(1) Petitioner claimed (R. 60, 61) that the final judgment (R. 256-8) did not cover the "fraud" case (No. 8336), and hence the disbursements in connection with the "fraud" case were not a part of the report of the trustee's disbursements. Petitioner is mistaken in that respect, as paragraphs 5, 6 and 7 (R. 257) cover the cross-bill and counterclaim filed by Howell Van Auken, as ancillary ad-

ministrator, wherein fraud was charged against Arthur Eddy and Walter Eddy, and the District Court in said final judgment (R. 256-8) dismissed said cross-bill and counterclaim, also the cross-bills and counterclaims filed by Dean Lucking, as guardian, and the cross-bills and counterclaims filed by Cynthia Mills Cleveland as co-counterclaimant, all arising out of the same claimed fraud on the part of her two uncles, Arthur and Walter Eddy.

Petitioner further claims (R. 54, 91, 96, 131, 138), that the case of *Davidson v. Young,* 290 Mich. 266, sets up the correct rule which the Federal court should follow. The same claim was made before the Circuit Court of Appeals, Sixth Circuit, prior to the affirmance of the original case, in petitioner's first main brief on the merits (Plaintiff's Exhibit No. 1110), at page 77, paragraph 4, wherein the case of *Davidson, Trustee, v. Young,* Michigan Supreme Court Advance Sheets, September 6, 1939, was cited, and on page 78 the entire page was occupied with a quotation therefrom.

In petitioner's petition for re-hearing in the Circuit Court of Appeals, Sixth Circuit, in the original case, being case No. 8366 (Plaintiff's Exhibit No. 1113), at page 3, in the center of the page, *Davidson, Trustee, v. Young,* 290 Mich., 266, is cited as authority.

The judgment of the District Court affirmed by the Circuit Court of Appeals, Sixth Circuit, was held conclusive by the Supreme Court of the State of Michigan, supra, citing *Davidson v. Young,* 290 Mich. 266, and writ of prohibition to stop further litigation in the Michigan courts was issued.

(2) Petitioner further claims that Mrs. Cleveland is not and should not be held liable for any counsel fees included in the trustee's expenses (R. 51, 52, 53). The law has been determined to the contrary by the District Court, the Circuit Court of Appeals, and Certiorari denied by this court.

In case No. 8366 before the Circuit Court of Appeals, Sixth Circuit, in appellants Van Auken and Cleveland's reply brief (Plaintiff's Exhibit No. 1109), appellant devoted page 103, Section XIV, pages 104 and 105 and a portion of page 106, to a discussion of this question, and cited *Sprague v. Ticonic National Bank*, 307 U. S. 161, along with other cases, and discussed the same.

In the brief for Second National Bank & Trust Company of Saginaw, Michigan, as trustees, etc., plaintiff and appellee (Plaintiff's Exhibit No. 1103), in case No. 8366, at page 62, the question of the payment of the trustee's expenses was discussed, and *Sprague v. Ticonic National Bank* cited and discussed, and the discussion continues to the middle of page 66.

In respondent's brief in opposition to petition for writ of certiorari in the Supreme Court of the United States, No. 1054 (Plaintiff's Exhibit 1116), at pages 35 and 36, the payment of the trustee's expenses is discussed, and *Sprague v. Ticonic National Bank* is cited and discussed.

In petitioner's motion for leave to file additional reasons relied on for allowance of writ of certiorari in the Supreme Court of the United States (Plaintiff's Exhibit 1114), at page 12, counsel for petitioners state that they had not been advised of the court's decision of *Sprague v. Ticonic*

National Bank, 307 U. S. 160 (although it had been previously discussed in their own briefs).

After a thorough discussion of the legality of that part of the judgment relating to the trustee's disbursements, in the Circuit Court of Appeals, and the citation of the case of *Sprague v. Ticonic National Bank, supra*, the Circuit Court of Appeals, Sixth Circuit, affirmed the judgment of the United States District Court (117 Fed. (2d) 1009), and after a like discussion of the case in this court and the citation of the Ticonic National Bank case, petition for writ of certiorari was denied and the judgment of the District Court thus affirmed. The law of the case was thus settled.

Then, in the state courts of Michigan, its validity was attacked. The Supreme Court of this state held that it was a valid judgment, and issued writ of prohibition to prevent further unnecessary litigation. *Second National Bank v. Reid, supra.*

(b) The Fees Were Reasonable

The only question then left in this case was the reasonableness of the trustee's disbursements. The proof disclosed that the witnesses on both sides thought they were reasonable (R. 130, 138, 142, 149, 174, 178), and, on the part of the appellee (R. 130, 138, 142, 149), that they were extremely low. See *Home, etc., v. Boomer*, 320 Ill. App. 541; 51 N.E. (2d) 830, 834 (Syllabus 7-9).

Petitioner claims the fees of the attorney should be determined on a per diem basis. Such is not the law.

"Value of attorney's services must be based upon a number of considerations, including the professional reputation and standing of the attorney, the difficulty and importance of the case and the amount of time spent and work performed, the sum involved, the result of the litigation.

Baxter v. Szucs, 248 Mich. 672; 227 N.W. 666;

Becht v. Miller, 279 Mich. 629; 273 N.W. 294;

Reichert v. Metropolitan Trust Co., 266 Mich. 322; 253 N.W. 313.

Time or labor alone is not sufficient in measuring the value for lawyer's services.

Woodbury v. Andrew Jergens Co., 37 Fed. (2d) 749, 750.

CONCLUSION

The law in this case has been determined by the Circuit Court of Appeals, Sixth Circuit, and this court has denied writ of certiorari. The trustee has submitted its disbursements and they have been found reasonable by the District Court, upon the uncontradicted testimony. The District Court has found as a fact that the disbursements were all in the above matter, viz.: Case No. 540 in Equity; that the "fraud" division and the "mismanagement" division were included in the final judgment of February 7, 1939 (R. 256), which ordered the reimbursement (Par. 8). The Circuit Court of Appeals affirmed the judgment (149 Fed. (2d) 466). The opinion by Judge Simons, found at page 266 of the record, which covers the entire litigation, affirms the judgment of the District Court and characterizes the litigation as "persistent, harassing and futile."

That should dispose of the matter.

Respectfully submitted,

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